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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. KATHLEEN ANN KOZICH, Defendant and Appellant.	H036260 (Santa Clara County Super. Ct. No. CC829816)

Appellant Kathleen Kozich seeks review of an order revoking her probation and sentencing her to prison. She contends that her due process rights were violated because she did not receive written notice of the probation conditions she had violated. She further asserts entitlement to additional conduct credits pursuant to the September 28, 2010 version of Penal Code section 2933. We will affirm the judgment.

Background

After stabbing her boyfriend with a knife, appellant was charged by information with assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)), with an accompanying allegation of a prior term in prison (Pen. Code, § 667.5, subd. (b)).[1] On January 28, 2010 she pleaded no contest to the charge and

[1] All further statutory references are to the Penal Code.

admitted the prison prior, in exchange for the promise of probation on specified terms. On February 26, 2010, the court suspended imposition of sentence and granted formal probation for three years. Among the terms of this disposition were the requirements that appellant refrain from possessing or consuming alcohol or illegal drugs and that she complete psychological or psychiatric treatment as directed by the probation department.[2]

Over the next five months appellant appeared for monthly assessments before the Mental Health Treatment Court. After the August hearing she tested positive for methamphetamine and marijuana, and she admitted that she had taken Vicodin.

At the September 8, 2010 hearing the MHTC judge asked appellant whether she had seen her doctor; she said she had. The judge then asked whether she had brought "all the stuff [she was] supposed to [bring]," and he asked her what she had been doing. She said, "Well, I'm doing better . . . than I've done in a long time. I'm happy where I'm at." When asked for clarification she explained, "I'm getting all my stuff transferred to my new doctor." She had moved to a place on the border of Santa Clara and Santa Cruz Counties. She was "not sure" of the name of her new doctor, to whom her files were being transferred; she had not been there yet.

The prosecutor interjected his opinion that "we have a serious honesty issue with Ms. Kozich." According to the prosecutor, appellant had told the probation officer in August after the prior court hearing that she had been "doing meetings," but she had not brought verification. She said she had taken one Vicodin pill without permission, and she had tested positive for methamphetamine and marijuana, all on that last court day.

The court expressed the view that since August, "nothing has changed." The prosecutor asked appellant whether she had used methamphetamine and marijuana with

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[2] While incarcerated appellant was diagnosed with Split Personality Disorder, Post-Traumatic Stress Disorder, and Attention Deficit Hyperactivity Disorder.

her boyfriend that day she was in court. She answered, "That's why I moved." She said it was not that day or the night before, but "probably like two or three days before that." The prosecutor was skeptical; he said that the methamphetamine would not still be in her system after two or three days. The court asked appellant where the meetings were taking place now; she said they were in Brookdale, but she did not know the name of the place. When challenged, she then said that it was a church down the street.

The MHTC judge pointed out that he had given appellant "chance after chance"; since May he had been telling her to "see the doctor, to get into treatment, to get connected, to get into substance abuse treatment and go to meetings. I told her that in May. . . . I told her that in June. I told her that in August. We're now in September, nothing has happened. Nothing changed." Noting that he "can't make her change," the judge revoked probation, remanded her into custody, and ordered a new assessment.

At the next hearing, which took place on October 20, 2010, appellant admitted having violated probation. The court then imposed a sentence consistent with the plea agreement: two years in prison, credit for 285 days, and no enhancement for the prison prior. The court thereafter amended the judgment to give appellant an additional 37 conduct days, for a total credit of 322 days. Appellant filed an amended notice of appeal and obtained a certificate of probable cause.

Discussion

1. Written Notice of Revocation Proceedings

Appellant first contends that her due process rights were violated because she did not receive written notice of her probation violation before the October 20 revocation hearing. She correctly notes that such written notice is required under federal and state law. (See *Black v. Romano* (1985) 471 U.S. 606, 612 [105 S.Ct. 2254]; *People v. Vickers* (1972) 8 Cal.3d 451, 458-460 [extending *Morrissey v. Brewer* (1972) 408 U.S. 471 due process requirements in parole revocations to probation revocations]; *Gagnon v. Scarpelli* (1973) 411 U.S. 778, 782-783 [93 S.Ct. 1756] [same].) Appellant maintains that without

such notice the court "lacked jurisdiction to act." We assume appellant means that the court acted in excess of its jurisdiction, as clearly it did not lack jurisdiction in the fundamental sense of an entire absence of authority over the parties or subject matter. (See *People v. Williams* (1999) 77 Cal.App.4th 436, 447; *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288.)

"The transcript of the hearing serves as the required written statement [of the reasons for revoking probation]. The court's reasons were clearly stated, are in a reviewable record and support its order." (*People v. Baker* (1974) 38 Cal.App.3d 625, 630.) But even if we were to find the transcript to constitute insufficient written notice, we nevertheless agree with the People that reversal is not required. Even a judicial act in excess of the court's jurisdiction "is valid until set aside, and parties may be precluded from setting it aside by such things as waiver, estoppel, or the passage of time." (*People v. Ruiz* (1990) 217 Cal.App.3d 574, 584; accord, *People v. Williams*, *supra*, 77 Cal.App.4th at p. 447.) When probation is revoked, a defendant can be found to have waived or forfeited the right to notice by acquiescing in the revocation. (*In re La Croix* (1974) 12 Cal.3d 146, 153, 156-157; see also *People v. Saunders* (1993) 5 Cal.4th 580, 590 [constitutional right may be forfeited in criminal as well as civil cases by failure to make timely assertion of the right]; *People v. Dale* (1973) 36 Cal.App.3d 191, 195 [waiver in revocation proceeding may occur when counsel submits alleged violation on probation report and defendant acquiesces by remaining silent].)

Here it is evident that appellant did forfeit her objection to the lack of formal written notice. Neither she nor her attorney protested at the September 2010 hearing when the court declared its intention to revoke probation. The court made it clear that it had given her ample opportunity to comply with the treatment conditions and attend meetings for her substance abuse problem. Instead, she had not only failed to demonstrate such compliance, but had even continued using prohibited drugs, as evidenced by her admission that she had taken Vicodin and her recent positive test for

methamphetamine and marijuana. By the time of the revocation hearing on October 20 appellant had new counsel, who likewise did not raise any issue of notice. The court began the proceedings by ascertaining that appellant knew she had a right to a hearing to determine whether she had violated probation. Appellant expressly gave up that right. She then admitted violating probation, with no objection by her or her attorney on any ground, and neither of them gave any indication that appellant was confused about why probation was being revoked.

In re Moss (1985) 175 Cal.App.3d 913 does not alter the result here. Not only was the procedural context entirely different (a petition for collateral relief arising from jail terms on multiple misdemeanor priors), but the circumstances of the revocation were also significant. The point of the disposition in *Moss* went beyond the lack of written notice of the defendant's probation violations; the court asked for his admission without any explanation of what the violations were, making only a reference to them in a "casual manner." (*Id*. at p. 929.) Here, by contrast, there is no basis for inferring from the record that appellant did not know in what ways she had violated probation. That she waived or forfeited written notice is not inconsistent with the outcome in *Moss*, as the court in that case acknowledged that "[a] probationer may, of course, waive his *Vickers* rights." (*Id*. at p. 930.)

Finally, even if we were convinced that appellant had not forfeited this issue on appeal, reversal would not be justified if the error was harmless beyond a reasonable doubt. (*In re La Croix, supra*, 12 Cal.3d at p. 154; *People v. Arreola* (1994) 7 Cal. 4th 1144, 1161.) Here we see no basis on which to suppose that formal written notice of the probation violations would have affected the outcome of the proceeding. The transcript of the hearing plainly indicates that the court was determined to revoke probation, as appellant admittedly had not complied with the conditions of her probation, among which was the prohibition on consuming illegal drugs.

2. Section 2933 Credits

At the original sentencing hearing on October 20, 2010, the trial court gave appellant credit for 285 days served—191 actual days and 94 days of local conduct credits pursuant to section 4019. Appellant subsequently sought a modification to award her "one for one" credits for 97 extra days, citing the version of section 2933 effective September 28, 2010.[3] In the event that the court declined to apply the new statute retroactively, appellant alternatively requested 37 days of credit for all days of presentence custody under the prior version of section 4019 effective January 25, 2010.

On March 7, 2011, the court granted appellant's alternative request and modified her sentence, giving her 37 additional conduct credits, for a total of 322 days. On appeal, she contends that she was entitled to all 97 requested days because the September 28, 2010 version of section 2933 must be applied retroactively in her case. She maintains that neither her offense nor her criminal history constituted a serious or violent felony within the meaning of section 1192.7, a point not disputed by the People. (See *People v. Delgado* (2008) 43 Cal.4th 1059, 1065.) The People do argue, however, that it is the Department of Corrections and Rehabilitation, not the court, that is responsible for both calculating and granting credits under section 2933. (Compare *People v. Duff* (2010) 50 Cal.4th 787, 793 [at sentencing, "credit for time served, including conduct credit, is calculated by the court"]; with *People v. Johnson* (2004) 32 Cal.4th 260, 265 [defendant temporarily returned to jail while awaiting resentencing is not entitled to presentence conduct credits] and *People v. Buckhalter* (2001) 26 Cal.4th 20, 33 [same].) We need not address that assertion, because appellant's contention fails on the merits in any event.

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[3] Appellant had spent time in presentence custody as follows: April 21, 2009 (date of arrest and booking) to May 23, 2009 (release on bail); November 4, 2009 (remand) to February 26, 2010 (probation order); and September 8, 2010 (summary revocation) to October 20, 2010 (sentencing).

The original version of section 2933, enacted in 1983, authorized the reduction of a prison sentence of six months for every six months in "work, training or education programs established by the Department of Corrections." (Stats. 1982, ch. 1234, § 4, pp. 4551-4552.) In late 2009 the Legislature passed two amendments to both section 2933 and section 4019. The first legislation (Stats. 2009, 3rd Ex. Sess. 2009-2010, ch. 28, §§ 38, 50, pp. 4420-4421, 4427-4428) was signed by the Governor on October 10, 2009, but because it was enacted during a special session of the Legislature, it took effect on January 25, 2010, 91 days after the special session adjourned. (Cal. Const., art. IV, § 8, subd. (c)(1).) The second amendment was urgency legislation that took effect September 28, 2010. (Stats. 2010, ch. 426, §§ 1, 2, pp. 2086-2088.)

The first amendment of section 2933 eliminated from subdivision (a) of the statute the provisions for "worktime" credits and replaced them with what appear to be custody credits. "For every six months of continuous incarceration, a prisoner shall be awarded credit reductions from his or her term of confinement of six months . . . pursuant to regulations adopted by the [Department of Corrections and Rehabilitation]." (§ 2933, subd. (b); Stats. 2009, 3rd Ex. Sess. 2009-2010, ch. 28, § 38, pp. 4420-4421.) The first amendment also added subdivision (e) to section 2933, providing, "A prisoner sentenced to the state prison under Section 1170 shall receive one day of credit for every day served in a county jail, city jail, industrial farm, or road camp after the date he or she was sentenced to the state prison as specified in subdivision (f) of Section 4019." (Stats. 2009, 3rd Ex. Sess. 2009-2010, ch. 28, § 38, p. 4421.)

The second amendment, however, substantially revised the subdivision. (Stats. 2010, ch. 426, § 1, p. 2087.) The version on which appellant relies stated, in pertinent part: "(e)(1) Notwithstanding Section 4019 and subject to the limitations of this subdivision, a prisoner sentenced to the state prison under Section 1170 for whom the sentence is executed shall have one day deducted from his or her period of confinement for every day he or she served in a county jail, city jail, industrial farm, or road camp

from the date of arrest until state prison credits pursuant to this article are applicable to the prisoner."

As with the first amendment of section 4019 and unlike the concurrent amendment of section 4019, this revision of section 2933 did not expressly provide for prospective or retroactive application. To the extent that it provides some guidance, section 3 states that "[n]o part of [the Penal Code] is retroactive, unless expressly so declared." This statute has been interpreted as a rule of construction that applies when the legislative intent cannot otherwise be ascertained. (*In re Estrada* (1965) 63 Cal.2d 740, 746.) It embodies a presumption that a new statute operates prospectively absent either an express declaration of retroactivity or a clear and compelling implicit indication that the Legislature intended retroactive application. (*People v. Hayes* (1989) 49 Cal.3d 1260, 1274; *People v. Alford* (2007) 42 Cal.4th 749, 753-754.)

Examining the text of the amendment and its legislative history, we see no express declaration of retroactivity for the amendments of section 2933 or 4019.[4] Appellant, however, calls attention to section 59 of Senate Bill 18, the legislation that created the first 2010 amendments of sections 2933 and 4019. Section 59 stated: "The Department

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[4] We do see an express declaration of retroactivity in another statute amended by the same legislation that amended sections 2933 and 4019. (Stats. 2009, 3rd Ex. Sess. 2009-2010, ch. 28, § 41, p. 4422.) Subdivisions (b), (c), and (d) were added to section 2933.3, providing: "(b) Notwithstanding any other law, any inmate who has completed training for assignment to a conservation camp or to a correctional institution as an inmate firefighter or who is assigned to a correctional institution as an inmate firefighter and who is eligible to earn one day of credit for every one day of incarceration pursuant to Section 2933 shall instead earn two days of credit for every one day served in that assignment or after completing that training. [¶] (c) In addition to credits granted pursuant to subdivision (a) or (b), inmates who have successfully completed training for firefighter assignments shall receive a credit reduction from his or her term of confinement pursuant to regulations adopted by the secretary. [¶] (d) The credits authorized in subdivisions (b) and (c) shall only apply to inmates who are eligible after July 1, 2009." This shows that the Legislature can make itself clear when it provides for retroactive application of credit statutes.

of Corrections and Rehabilitation shall implement the changes made by this act regarding time credits in a reasonable time. However, in light of limited case management resources, it is expected that there will be some delays in determining the amount of additional time credits to be granted against inmate sentences resulting from changes in law pursuant to this act. An inmate shall have no cause of action or claim for damages because of any additional time spent in custody due to reasonable delays in implementing the changes in the credit provisions of this act. However, to the extent that excess days in state prison due to delays in implementing this act are identified, they shall be considered as time spent on parole, if any parole period is applicable." (Stats. 2009, 3rd Ex. Sess. 2009-2010, ch. 28, § 59, p. 4432.)

Appellant points out that uncodified section 3 of the legislation implementing the second amendments (Senate Bill 76) stated, "The Legislature intends that nothing in this act shall affect Section 59 of Chapter 28 of the Third Extraordinary Session of the Statutes of 2009, and that this act be construed in a manner consistent with that section." (Stats. 2010, ch. 426, § 3, p. 2088.) According to appellant, the "unmistakable implication is that the Legislature intended the new credits formula to operate as to not only future cases but also . . . inmates already in prison. Otherwise, there would be no need to recalculate credits and no reason to be concerned that an inmate might overstay his sentence if the recalculation does not occur quickly." We cannot agree. Nothing in section 59 suggests that the changes in the law pursuant to this act were intended to apply retroactively. The legislation containing section 59 amended and enacted other statutes pertaining to credits, including enacting section 2933.05, requiring the promulgation of program credit regulations, and providing in section 2933.3 for a limited retroactivity for credits for inmate firefighters. There is no indication that the Legislature intended to increase its administrative burden by making the changes (other than in section 2933.3) retroactive.

As courts often observe, "[c]redit is a privilege, not a right. Credit must be earned . . . ." (§ 2933, subd. (c).) Section 4019, and now section 2933, subdivision (e), were designed at least in part to facilitate management of prisoners by motivating compliant behavior while in local custody. This objective cannot be served by a retroactive application of the amendment of section 2933, as "it is impossible to influence behavior after it has occurred." (*In re Stinnette* (1979) 94 Cal.App.3d 800, 806 (*Stinnette*) [upholding expressly prospective application of section 2931 authorizing post-sentence good conduct credit for behavior in prison].) We will not ascribe such incongruous intent to the Legislature. Giving compliant prisoners extra credit for their past behavior would confer an unexpected windfall and unearned bonus on those who have already conducted themselves in the belief that they were earning two days of conduct credit for every four days of good behavior in custody. Finding no compelling indication of retroactive application, we conclude that the second amendment of section 2933 is prospective, not retroactive, just as when similar language was added to section 4019.[5]

Appellant also argues that as long as anyone in local custody is entitled to the extra conduct credits authorized by section 2933, subdivision (e), equal protection requires that it be extended to those who were in local custody prior to September 28, 2010, the effective date of the amendment. However, we perceive no equal protection problem in giving the amendment a prospective application. " '[A] reduction of sentences only prospectively from the date a new sentencing statute takes effect is not a denial of equal protection.' " (*People v. Floyd* (2003) 31 Cal.4th 179, 189 [finding no equal protection violation in the expressly prospective application of Proposition 36 (§ 1210.1)

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[5] The California Supreme Court has granted review of a case holding otherwise. (*People v. Kemp* (2011) 192 Cal.App.4th 252 [3rd Dist.], rev. granted Apr. 13, 2011, S191112.)

providing for mandatory probation for some convicted of nonviolent drug possession offenses].) "'[T]he Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time.' " (*Id.* at p. 191, quoting *Sperry & Hutchinson Co. v. Rhodes* (1911) 220 U.S. 502, 505.) " 'In the context of equal protection, "[a] refusal to apply a statute retroactively does not violate the Fourteenth Amendment." . . . ' " (*Stinnette*, *supra*, 94 Cal.App.3d 800, 806.)

Appellant's reliance on *In re Kapperman* (1974) 11 Cal.3d 542 (*Kapperman*) and *People v. Sage* (1980) 26 Cal.3d 498 (*Sage*) in support of her equal protection argument is unavailing. In *Kapperman*, the Supreme Court reviewed the constitutionality of section 2900.5, which provided that at sentencing a person convicted of a felony offense would be credited with the actual time in jail before beginning the prison sentence. Subdivision (c) of section 2900.5 made the credit prospective only, thus limiting its benefit to those who were delivered to the Department of Corrections after March 4, 1972, the effective date of the legislation. (*Id.* at pp. 544-545, fn. omitted.) The Supreme Court held that prospective application of the credit for actual time in presentence custody violated equal protection because it withheld a substantial benefit from similarly situated persons -- that is, those serving time in state prison -- and it was "not reasonably related to a legitimate public purpose." (*Id.* at p. 545.) The court rejected arguments that extending the reach of custody credits would interfere with the effective operation of the then-prevailing Indeterminate Sentence Law (*id.* at pp. 546-548) and would create an insurmountable administrative burden (*id.* at pp. 549-550).

The holding of *Kapperman* was not intended to apply to changes in what were then called "good time" credits, now "conduct" credits. The statutory objective of motivating compliant behavior cannot be achieved by awarding an unearned windfall. Conduct credits must be earned by a defendant, whereas custody credits are

constitutionally required and awarded automatically on the basis of time served. Appellant was not denied credit for her actual time in presentence custody.

Sage is also inapposite. There the Supreme Court considered a prior version of section 4019 which denied presentence conduct credit to a detainee eventually sentenced to prison, while credit was given to detainees sentenced to jail and to felons who served no presentence time. (*Id*. at p. 507.) The Supreme Court rejected this distinction, finding no "rational basis for, much less a compelling state interest in, denying presentence conduct credit to detainee/felons."[6] (*Id*. at p. 508.) The equal protection violation in *Sage* was based not on the time of its enactment or its effective date, nor on whether the defendant's custody was pre- or post-sentence, but on the defendant's ultimate status as a misdemeanant or felon. By contrast, the timing of the effective date of a statute, even one that reduces the punishment for a particular offense, does not create an equal protection violation. (*People v. Floyd*, *supra*, 31 Cal.4th at p. 188.) Because the grounds for the legislative distinctions in *Sage* and *Stinnette* were different, we reject appellant's suggestion that *Sage* implicitly overruled *Stinnette*.

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[6] Section 4019 was amended to codify the *Sage* holding. (Stats. 1982, ch. 1234, § 7, p. 4553.)

Disposition

The judgment is affirmed.

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ELIA, Acting P. J.

WE CONCUR:

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BAMATTRE-MANOUKIAN, J.

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WALSH, J. *

* Judge of the Santa Clara County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.